IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.137 OF 2005

Mr.Gerard D'Mello ..Petitioner.

Vs.

Municipal Corporation of

Greater Bombay & Ors. ..Respondents.

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Mr.R.M. Nakhwa with Mr.V.B.Dhavan for the Petitioner.

Mrs.A.R.Joshi for the BMC, Respondent Nos.1 to 4.

Mr.R.A.Fernandes for Respondent No.10.

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CORAM : DR.D.Y.CHANDRACHUD, J.

21st February, 2005.

P.C. :

1. Rule. Counsel appearing on behalf of Respondent Nos.1 to 4 and Respondent No.10 waive service. On the request of counsel appearing on behalf of the Petitioner, permission is granted to delete Respondent Nos.5 to 9. With the consent of the learned counsel and at their request, the Petition is taken up for hearing and final disposal

at the stage of admission.

2. The Petitioner has developed certain immovable property being a plot of land bearing City Survey No.1333 admeasuring about 700 sq.yds. situated at Marol Village, Church Road, Andheri (East) in pursuance of a development agreement dated 14th September, 1997 with Respondent Nos.5 to 9. Disputes arose between the Petitioner and Respondent Nos.5 to 9 which led to the institution of a suit by Respondent Nos.5 to 9 in this Court (Suit 3909 of 2001) which is pending. A Notice of Motion that was taken out in the said suit was disposed of by an order dated 25th March, 2004 (Exh.O to the Petition). By the aforesaid order, the learned Single Judge while confirming the earlier ad interim order dated 11th December, 2001, appointed the Court Receiver as Receiver of six flats in the building with a direction to the Receiver to take possession of the aforesaid flats and to appoint the Plaintiffs to the suit as agents on usual terms and conditions except a condition in regard to the payment of royalty and security.

3. The dispute in the present petition is confined

to a demand for property taxes and an order of attachment levied by the Municipal Corporation. On 22nd April, 2003, the Assistant Assessor and Collector in the 'K' East ward issued a notification recording that the property was assessed to municipal taxes as land being built upon with effect from 1st September, 1998 upon the demolition of the original structure and that a rateable value of Rs.1,26,810/- was fixed. On the completion of the building, it was stated that the rateable value was revised to Rs.5,49,790/- with effect from 1st April, 2002. On 6th September, 2004 a grievance was made to the Municipal Corporation that neither were any notices under Sections 162 or 167 of the Mumbai Municipal Corporation Act, 1888 issued nor was a hearing granted before the rateable value was fixed on the basis of the property being land under construction. A grievance was made that the assessment of the property on the basis that it was land under construction was contrary to the judgment of the Supreme Court in the Municipal Corporation of Greater Bombay v. M/s. Polychem Limited (AIR 1974 SC 1779).

4. Counsel appearing on behalf of the Municipal Corporation states that no instructions are forthcoming in the present proceedings despite communications to the concerned officers. It is a well settled principle of law, following the decision of the Supreme Court in the Municipal Corporation of Greater Bombay v. M/s. Polychem Limited (AIR 1974 SC 1779) that where land is being built upon, unless the resultant structure is legally fit for occupation, the assessment cannot be otherwise than as vacant land. In other words, unless and until the construction has reached a stage at which some occupation of the constructed portion is actually and legally possible, the land on which the structure is situated has to be classified as vacant land for the purposes of fixing the rateable value. In my view, it was only necessary and proper that the Assessor and Collector should be governed by these binding principles of law which have been laid down by the Supreme Court and which have been followed in several judgments of this Court including the judgment of a learned Single Judge in Vimochit Samaj Co-operative Housing Society Ltd. v. Assessor and Collector (2004(3) Mh.L.J.869). In

the circumstances, this Petition is disposed of by quashing and setting aside the order of the Assistant Assessor and Collector dated 22nd April, 2003 (Exh.L). The Assistant Assessor & Collector is directed to redetermine the assessment in accordance with law after furnishing the parties concerned an opportunity of being heard. The parties are directed to appear before the Assessor and Collector on 7th March, 2005 on which date directions would be given for the early disposal of the proceedings.